INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and ruling involved	2
Statement	4
Summary of Argument	9
Argument	12
I. The exemption from the overtime requirements of the Fair Labor Standards Act given by Section 7(c) to employers engaged in the "first processing of * * * perishable or seasonal fresh fruits or vegetables" does not apply to an employer engaged in the post-seasonal repackaging of vegetables which it has previously frozen and stored in bulk containers	12
A. Introduction	12
B. The purpose of the exemption is to relieve seasonal pressures and it does not apply to post-seasonal operations which may be performed at the employer's convenience	15
C. The consistent administrative interpretation of the Act is controlling	22
II. The Section 7(c) exemption does not apply to an employer engaged in mixing and packaging vegetables previously frozen and bulk-packaged by other processors	21
III. Neither the repackaging nor the mixing operations are within the additional exemption provided by Section 7(b)(3)	26
Conclusion	29

CITATIONS

Cases:

Abram v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 19

Cases—Continued	Page
Addison v. *Holly Hill Co.*, 322 U.S. 607	24
Alstate Construction Co. v. *Durkin*, 345 U.S. 13	11, 24
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410	12, 28
Domenico v. *Mitchell*, 232 F. 2d 112	26
East Texas Motor Freight Lines, Inc. v. *Frozen Food Express*, 351 U.S. 49	14
Hendricks v. *DiGiorgio Fruit Corp.*, 49 F. Supp. 573	19
Libby, McNeill & Libby v. *Mitchell*, 256 F. 2d 832	23, 27, 28
McComb v. *Hunt Foods, Inc.*, 167 F. 2d 905, certiorari denied, 335 U.S. 845	10, 19
Maneja v. *Waialua Agricultural Co.*, 349 U.S. 254	19, 24
Mitchell v. *Budd*, 350 U.S. 473	8, 14
Mitchell v. *Kentucky Finance Co.*, 359 U.S. 290	24
Phillips Co. v. *Walling*, 324 U.S. 490	24
Shain v. *Armour & Co.*, 50 F. Supp. 907	19
Steiner v. *Mitchell*, 350 U.S. 247	24
Walling v. *Swift & Co.*, 131 F. 2d 249	19
Statutes and regulations:	
Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*:	
§ 3(h)	27
§ 7(a)	3, 5
§ 7(b)(3)	3, 5, 8, 9, 11, 12, 24, 26, 27, 28
§ 7(c)	2, 3, 5, 8, 9, 11, 12, 13, 16, 17, 18, 19, 24, 26, 27, 28
§ 13(a)(5)	18
§ 13(a)(10)	8
§ 15(a)(1)	5
§ 15(a)(2)	5
§ 17	4
Fair Labor Standards Act Amendments of 1949, § 16(c), 63 Stat. 920	11, 23
Transportation Act of 1958, 72 Stat. 568	14
29 C.F.R. (1958 Supp.) 780.51(b)(1)	11, 22
29 C.F.R. (1958 Supp.) 780.51(b)(2)	11, 26

Miscellaneous: Page

Bulk Bins Save on Frozen Food Storage, Western Canner & Packer, v. 49, No. 10 21
Bureau of the Census, *1954 Census of Manufacturers* 13
83 Cong. Rec. 7419 ..... 10, 16
83 Cong. Rec. 7421 18
83 Cong. Rec. 7423 18
Cruess, *Commercial Fruit and Vegetable Products* (1948) 11
Directory of Frozen Food Processors, 1958, published by the trade journal, Quick Frozen Foods 13
5 Fed. Reg. 3167 ..... 4, 12, 27
17 Fed. Reg. 9615 23
Hearings before House Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. 23, 24
Hearings before Subcommittee of Senate Committee on Labor and Public Welfare on S. 58, etc., 81st Cong., 1st Sess. 24
H. Rep. No. 1453, 81st Cong., 1st Sess 24
Interpretive Bulletin No. 14, 35 W.H.M. 351 25
Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, Pt. 3, 75th Cong., 1st Sess. 17
Wage and Hour Release No. 1892, January 25, 1943 23

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 49-63) is reported at 145 F. Supp. 157. Its findings of fact and conclusions of law (R. 64-72) are unreported. The opinion of the court of appeals (R. 175-177) is reported at 254 F.2d 116. Its opinion on petition for rehearing (R. 178-180) is reported at 264 F.2d 599.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1958 (R. 177). A timely petition for rehearing was denied on September 24, 1958 (R. 177-180). By orders of Mr. Justice Douglas, dated

December 19, 1958, and January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including February 21, 1959. The petition for a writ of certiorari was filed on February 19, 1959, and granted on April 6, 1959 (R. 180). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a frozen foods processor who freezes vegetables and packs them in bulk containers during the harvesting season, stores them until after the season has ended, and thereafter repackages them in consumer packages, is engaged in the "first processing of * * * fresh fruits or vegetables" during the post-seasonal storing and repackaging so as to be exempt under § 7(c) of the Fair Labor Standards Act from the overtime requirements of the Act.

2. Whether a frozen foods processor who mixes vegetables previously frozen by it with vegetables purchased, already frozen and packed in bulk, from others is entitled to the exemption under § 7(c) while engaged in preparing and packaging the mixed vegetables.

3. Whether the repackaging or mixing operations qualify for an additional exemption under a determination made by the Administrator under § 7(b)(3) of the Act.

STATUTE AND RULING INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) are as follows:

Sec. 7.(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

* * * *

(3) for a period of periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any

> place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.
>
> * * * * *

The determination made by the Administrator of the Wage and Hour Division, Department of Labor, on August 23, 1940 (5 Fed. Reg. 3167), provides in part:

> The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of section 7(b)(3) of the Fair Labor Standards Act and Part 526 as amended of the Regulations issued thereunder.

STATEMENT

On July 15, 1954, the Secretary of Labor brought this action under § 17 of the Fair Labor Standards Act (52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*) to enjoin respondent Oregon Frozen Foods Company (Oregon)[1] from violating § 7(a) (and

[1] Respondent Ore-Ida Potato Products, Inc., a closely-affiliated company sharing Oregon's premises, is a party only

therefore § 15(a)(1) and (2)) of the Act (R. 3-6). Section 7 (a) requires that employees engaged in the production of goods for commerce be paid time-and-a-half for work in excess of 40 hours a week. Section 7(c), however, provides that:

> * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables * * * the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

For the "first processing * * * of perishable or seasonal fresh fruits and vegetables" there is also available an *additional* 14-week exemption under a determination made by the Administrator under § 7(b)(3) of the Act.[2] The district court, after trial, held that Oregon was engaged in the "first processing" of fresh vegetables, and hence entitled to the exemptions, during all the periods involved (R. 49-72). The court of appeals affirmed (R. 175-177) and denied rehearing (R. 178-180).

1. Oregon, with a highly mechanized plant[3] lo-

---

because the two companies jointly employ a common office, maintenance, and warehouse force, which employees are exempt only when Oregon's production employees are also exempt (see R. 67, 69). The issues here involve only Oregon's production employees.

[2] See pp. 26-27, *infra*.

[3] The plant, shared with Ore-Ida (see note 1, *supra*), has five quick-freezing units, four with moving belts and one stationary, two cold storage rooms, and various huskers,

cated at Ontario, Oregon, is engaged in the production and sale in interstate commerce of frozen corn, carrots, and mixed vegetables (R. 14). During the harvesting season, it receives from nearby growers large quantities of corn and carrots which must be promptly processed and frozen. As part of the preparation for freezing (in addition to cutting, cleaning, etc.), the vegetables are subjected to steam for several minutes in order to kill the enzymes that are responsible for organic growth and deterioration (R. 16-18, 122). This "blanching"—in effect, a "partial cooking" (R. 17, 98, 124)—also softens the vegetables and intensifies their color (R. 122-123).[4] After being quick-frozen in a loose form (R. 83), some of the vegetables are immediately packaged in consumer-size cartons. Normally, however, only a small part of the vegetables (*e.g.*, less than one-third of the 1954 corn crop (R. 24)) are so packaged dur-

---

conveyors, steam blanchers, washers, steam and abrasion peelers, cutters, silkers, and packaging machinery (R. 15-18, 90, 108).

[4] Professor Ornsdorff, the Government's expert witness, detailed the effects of blanching and freezing: "[L]ife is a function of enzymes" (R. 126) and a harvested vegetable is still a living organism which will continue to ripen or even reproduce until its enzymes are killed (R. 126, 129, 140, 146). By killing the enzymes, blanching destroys all plant life and thus arrests the natural causes of deterioration (R. 122, 127). Freezing also causes structural changes and softens the vegetables (R. 139, 143). After blanching and freezing, perishability from natural causes should be stopped (R. 129) and any deterioration thereafter is due mainly to largely controllable physical factors, such as temperature and humidity (R. 141, 145). Oregon's expert witness agreed generally with that testimony (R. 157-159).

ing the season. The balance is packed in bulk containers and placed in cold storage to be repackaged after the season ends (R. 17, 25, 52).

Although it is desirable to dispose of the frozen vegetables as soon as possible after the season ends, in order to avoid the risk of dehydration during storage, the lack of firm orders for the vegetables—a large part of which are packaged under "buyers' labels" (R. 82, 112)—often causes the repackaging operations to be spread out over many months (R. 89). Thus, although the active corn season extends only from August 1 to October 10, the repackaging of bulk-frozen corn continued, for the 1954 crop, until the following May 22; for the 1953 crop, until August 1; and for the 1952 crop, until February 1 (R. 66). The active carrot season is from October 15 to December 1, but the repackaging of carrots continues throughout December (*ibid.*).

In addition to repackaging the bulk-frozen corn and carrots as such, Oregon also prepares and packages, from October into January, a vegetable mix consisting of corn, carrots, lima beans, string beans, and peas (R. 66). The vegetables other than corn and carrots it purchases, already frozen in bulk, from frozen food processors in Oregon, Washington, and California (R. 19). All of the vegetable mix is packaged under "buyers' labels" (R. 112).

Oregon employes some 300 production workers to process corn during the active corn season, but retains only 20 after the end of the season to sort, inspect, grade, and repackage the bulk-frozen corn (R. 19). It employs 40 production workers to handle

carrots during the active carrot season, but retains only 20 after the season to repackage the bulk-frozen carrots and prepare the vegetable mix (R. 20).

2. In 1952 and 1953, Oregon, claiming exemptions under §§ 7(b)(3) and 7(c) of the Fair Labor Standards Act,[5] did not pay overtime rates for work performed during selected weeks (R. 23, 36), and it is stipulated that Oregon will continue that practice unless enjoined in this action (R. 23-24). Some of the weeks were during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables and immediately packaging them in either consumer-size packages or bulk containers. It was conceded at the trial that Oregon was entitled to the exemptions during those weeks (R. 30-32, 67). During other weeks for which exemptions were claimed, however, Oregon was engaged only in storing, repackaging, and mixing vegetables previously frozen and stored in bulk. It was contended by the Government that those post-seasonal operations did not constitute part of the "first processing" within the meaning of § 7(c) and the § 7(b)(3) determination, and hence that Oregon was not entitled to the exemptions when so engaged (R. 27).

3. The district court held that the repackaging of the bulk-frozen vegetables was not a "new process" but a "reasonable continuation and a part of 'the first

---

[5] Oregon also claimed an exemption under § 13(a)(10), contending that the Administrator's definition of the "area of production" for purposes of that section was invalid (R. 28-29). After this Court upheld the definition in *Mitchell* v. *Budd*, 350 U.S. 473, the district court denied the claim (R. 56-58), and it has apparently now been abandoned.

processing of perishable or seasonal fresh fruits or vegetables' ", which was not completed until the vegetables were "packaged in consumer size packages even though delayed" (R. 62, 68). That followed from its view that "the first process is completed," within the "spirit and intent" of the Act, only when "there is a finished product for market" (R. 62-63). It accordingly held that Oregon was entitled to the exemptions when engaged in the post-seasonal storing, repackaging and mixing operations (R. 49-72).[*]

The court of appeals affirmed, holding in its first opinion that the question turned upon "factual issues" and that the "facts support the conclusion adopted" (R. 175-177). In an opinion denying rehearing, the court explained its first opinion as holding simply that the district court's "interpretation of the clause of the statute relating to 'first processing,' in view of the facts found in the record, was correct" (R. 178). The court further stated, however, that blanching and freezing did not amount to "processing" at all (R. 180).

SUMMARY OF ARGUMENT

1. The exemption under § 7(c) of the Fair Labor Standards Act for the "first processing of * * *

[*] The opinion, after upholding the § 7(c) exemption, stated that "it is not necessary to decide" whether the § 7(b)(3) exemption applies (R. 63), but the claim of the additional exemption was in fact upheld in the conclusions of law (Concl. VII, R. 70). Apparently the court had initially assumed, erroneously (see R. 36, 18), either that the exemptions were not cumulative or that Oregon had not claimed exemption for more than a total of 11 weeks.

perishable or seasonal fresh fruits or vegetables" does not apply to Oregon's repackaging, after the season ends, of the vegetables which it has previously frozen and stored in bulk containers. Whether such repackaging should be viewed as part of a single "processing" which began with the initial freezing operations or as a separate operation not included in the "first processing" turns on the purposes of the statutory exemption. From the fact that the exemption applies only to "perishable or seasonal" produce, it is apparent that its underlying purpose was to afford relief from the maximum-hours limitations when use of overtime is made essential by the "seasonal" influx or the "perishability" of the produce. That purpose is confirmed by the statement of the sponsor of the provision that certain "seasonal commodities" should be exempt during the "peak season" (83 Cong. Rec. 7419) and has been recognized in numerous decisions. *E.g.*, *McComb* v. *Hunt Foods, Inc.*, 167 F.2d 905, 906-907 (C.A. 9). Construed in the light of that purpose, "first processing" should be interpreted as terminating when the vegetables have been processed to a preservable state and there is a break in the operations, for the subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption.

In this case, the "first processing", as so interpreted, ends when the vegetables have been frozen and stored in bulk containers, for they are then no longer "perishable" and the subsequent operations may be spread out over many months. Although there is some risk of dehydration if frozen vegetables

are stored too long, such deterioration is of a very different order, in terms of urgency, than that implied by the term "perishable" as used in the statute, and does not present the compelling necessity for overtime that Congress recognized as justifying an exemption from the premium-pay requirements.

That interpretation of "first processing" is adopted in the regulations (29 C.F.R. (1958 Supp.) 780.51 (b)(1)) and has been consistently followed by the Administrator since at least 1943. Being fully consistent with the statute and having the added force given to such interpretations by § 16(c) of the 1949 amendments to the Act (63 Stat. 920), that interpretation should be controlling. *E.g., Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17.

2. Even if Oregon were entitled to an exemption under § 7(c) when repackaging its own previously-frozen vegetables, it would not be entitled to the exemption when mixing and packaging vegetables previously frozen by other processors. Since that is the only operation performed by Oregon on such vegetables, it cannot be treated as a part of some earlier "processing" (29 C.F.R. (1958 Supp.) 780.51 (b)(2)), and, standing alone, it is clearly neither the "first" processing nor performed on "fresh" vegetables.

3. Section 7(b)(3) of the Act provides an additional 14-week exemption from the overtime provisions for industries determined by the Administrator to be of a "seasonal nature", and the Administrator has made such a finding for the "first processing * * * of perishable or seasonal fresh fruits and vege-

tables." 5 Fed. Reg. 3167. Even if, contrary to our view, the Administrator's definition of "first processing" were not controlling on the interpretation of § 7(c), it would seem necessarily to govern the meaning of that term as used in the Administrator's own industry determination under § 7(b)(3). See, *e.g.*, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414. Oregon would not, therefore, be entitled to the additional exemption under § 7(b)(3) even if it were held to be entitled to the § 7(c) exemption.

ARGUMENT

I

The Exemption From the Overtime Requirements of the Fair Labor Standards Act Given By Section 7(c) To Employers Engaged in the "First Processing of * * * Perishable or Seasonal Fresh Fruits or Vegetables" Does Not Apply To An Employer Engaged in the Post-Seasonal Repackaging of Vegetables Which It Has Previously Frozen and Stored in Bulk Containers.

A. Introduction.

The primary question in this case is whether Oregon is entitled to an exemption under § 7(c) of the Fair Labor Standards Act when engaged only in repackaging vegetables which it has itself previously frozen and stored in bulk containers. If it is not entitled to that exemption, it follows that it is likewise not entitled to the additional exemption under § 7(b)(3) or to either exemption when it is also engaged in mixing and packaging vegetables

previously frozen by others.[7] These questions (Points II and III, *infra*) need be separately considered only if it is held that Oregon is exempt under § 7(c) when repackaging its own previously-frozen vegetables.

Since the exemption under § 7(c) is granted only for the "first processing" of perishable or seasonal fresh fruits or vegetables, the controlling question is whether the initial freezing and bulk-packaging and the subsequent repackaging are to be viewed as but steps in a single, though suspended, "processing" or as two separate processings.[8] If viewed as sepa-

---

[7] Obviously, also, if the repackaging itself is not exempt, the "storing" of the frozen vegetables preparatory to such repackaging is not exempt.

[8] The suggestion of the court below, in denying rehearing, that blanching and freezing do not amount to "processing" at all (R. 180) is difficult to understand. Unless they are "processing" they cannot be "first processing," which is the very basis upon which the exemption was allowed. The court's assertion that freezing is not "processing in common acceptance of the term or in trade usage" (R. 180) is contradicted not only by the trade journals and Government publications (*e.g.*, the industry's own directory is entitled *Directory of Frozen Food Processors* and the *1954 Census of Manufacturers* lists the industry under "frozen food processing establishments") but by the repeated references of respondents' president and counsel, throughout the trial, to blanching and freezing as "processing" (R. 80, 85, 86, 90, 91, 96, 97, 104).

It is clear in any event that freezing is "processing," not only in the common acceptance of the term, but also in the sense that it significantly changes the form of the commodity. There can be no question that blanching (which kills the enzymes and "partially cooks" the vegetables (R. 17, 98, 122-124)) and freezing (which "disorganizes the tissues, renders them permeable, and liberates enzymes"

rate, the initial freezing and bulk-packaging is undeniably the "first" processing and the repackaging is at most a "secondary" processing incidental to Oregon's marketing operations, which, moreover, is performed not on "fresh" vegetables but on frozen ones. If, on the other hand, the repackaging is viewed as an integral, though delayed, part of a single "processing" which began with the receipt of the freshly-harvested crops, it is by definition part of the "first" processing, which, in turn, is performed on "fresh" vegetables.

Viewing the phrase "first processing" in isolation, there is perhaps little to choose between the two characterizations of the repackaging operations. On the one hand, there is an obvious break in the processing when the vegetables, having been frozen and packed in bulk containers, come to rest, for an indefinite period, in the cold storage rooms. On the

---

(Cruess, *Commercial Fruit and Vegetable Products* 765 (1948); R. 139, 143)) change the natural state of the vegetables just as surely as "bulking" does tobacco. See *Mitchell* v. *Budd*, 350 U.S. 473, 481. The complexity of the freezing operations (R. 16-18) and the extensive equipment required (see note 3, *supra*) likewise preclude a characterization of freezing as something less than processing. Cf. *Budd*, *supra*, at 475. Finally, in *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49, 53-54, this Court, although holding that frozen foods were within an exemption from the Interstate Commerce Act for "agricultural * * * commodities (not including manufactured products thereof)", expressly recognized that frozen foods "have gone through a processing stage" although short of transformation into a "manufactured" product. See also 72 Stat. 568 amending the Interstate Commerce Act to exclude frozen foods from that exemption.

other hand, packaging would admittedly be part of the first processing if performed immediately after the freezing, and it may with some reason be said that it should make no difference that that step is simply postponed until after the seasonal pressures are over.

That ambiguity disappears, however, when "first processing" is viewed in the light of the purposes sought to be served by the exemption. We shall show, both from the terms of the statute itself and from its legislative history, that the purpose of the exemption was simply to afford relief from the maximum-hour limitations when the use of overtime is made unavoidable by the "seasonal" influx or the "perishability" of the produce and hence that the exemption ends when the processor has put the vegetables in a preservable form and stored them for further processing at its convenience. Additionally, we shall show that that interpretation has been consistently followed by the Administrator and that the administrative interpretation should be controlling to resolve any doubts.

B. THE PURPOSE OF THE EXEMPTION IS TO RELIEVE SEASONAL PRESSURES AND IT DOES NOT APPLY TO POST-SEASONAL OPERATIONS WHICH MAY BE PERFORMED AT THE EMPLOYER'S CONVENIENCE.

1. For the purposes of the exemption it is unnecessary, we believe, to go further than the language of the exemption itself, which is granted not for all "first processing" but only for the first processing of "perishable or seasonal" fresh fruits or vegetables. Admittedly, that limitation does not conclude the

question as a matter of syntax, since, as noted above, Oregon's processing does *start* with "perishable or seasonal" produce and, if the repackaging is deemed part of a single unitary processing, it necessarily qualifies for the exemption. The limitation does, however, afford the key to the purposes of the exemption and thus to whether the repackaging should be viewed as simply a "part" of the initial processing or as a separate operation.

That which distinguishes "perishable or seasonal" vegetables from others is that their initial processing when received from the farm inevitably, or nearly so, requires the use of overtime: "perishable" vegetables, because prompt processing is essential for preservation, and "seasonal" vegetables, because the heavy influx during the short but long-houred harvesting season must be handled. Therein, we submit, lies the reason for the exemption, and § 7(c) should therefore be construed as intended to exempt neither more nor less than the overtime required by seasonal or perishability pressures.

2. Although meagre, the legislative history of § 7 (c) fully supports the inferences of purpose to be drawn from its language. The subsection was offered as a Committee amendment on the floor of the House by Representative Norton, who explained simply that "discussion of the bill in the Labor Committee" had revealed that "there are certain seasonal commodities that should at least be exempted from the hours provision of the bill during what we call the peak season." 83 Cong. Rec. 7419. That statement, as well as the reasons that were advanced at

the committee hearings for such an exemption,[9] demonstrate, we believe, that it was intended by § 7(c) to exempt only overtime "during * * * the peak season."

Equally significant, particularly in light of the district court's suggestion that "first processing" is not completed until "there is a finished product for market" (R. 62-63), is what Congress did not do. As a substitute for the "first processing" exemption

---

[9] See, *e.g.*, the statement of the National Canners Association on the practical necessity for overtime operations during the harvesting season (*Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200*, Pt. 3, 75th Cong., 1st Sess., p. 1133):

> Despite spaced plantings, the total period in which perishable agricultural commodities may be harvested is limited by the seasonal factors of spring frosts, summer heat, humidity, rainfall, relative day and night temperatures, etc. In many cases, the total harvesting period can cover only a few hundred hours. Cool weather retards and a hot spell accelerates the tonnage which will ripen on a given day. When the fruit or vegetable has reached proper maturity, the farmer, in order to obtain the maximum economic return, must harvest it at full ripeness and maturity before rapid deterioration sets in. * * * Products such as peas or sweet corn must be harvested [and] processed within a few hours or else deterioration causes either a substantial reduction in value or complete loss. * * * In addition, the high and low points of tonnage harvested and delivered by the farmer are intermittent. Sometimes a period of cool weather will result in complete retardation of maturity and permit the harvesting of only enough raw commodity to permit a few hours' daily work. A period of hot weather will produce a glut requiring fairly long hours.

proposed by Representative Norton, Representative Coffee offered an amendment that would have extended the exemption to the "processing * * *, distributing or handling" of seasonal or perishable agricultural products. 83 Cong. Rec. 7421. The very reason given for that proposal, which would have included all operations leading to the final marketable product, was that such operations would not necessarily be included in the narrower exemption for "first" processing (*ibid.*). The rejection of that proposal in favor of the exemption limited to "first processing" (83 Cong. Rec. 7423) precludes, we submit, the district court's interpretation of the provision as exempting all steps leading to a "finished product for market."[10] The line must rather be drawn in terms of the seasonal or perishability pressures the exemption was designed to alleviate.

3. From both the statute and its legislative history, therefore, we think it clear, as the lower courts have

---

[10] That interpretation is further precluded by the striking contrast between the form of the exemption here—simply the "first processing of * * * fruits or vegetables"—and the exemptions in § 7(c) itself for the "first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products" and the "processing of sugar beets, sugar-beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into sirup." Those provisions define the exemption primarily in terms of the end product and, indeed, expressly include the further processing of previously-processed commodities (*e.g.*, "cream" or "sugar-beet molasses"). Compare also § 13(a)(5), in which Congress expressly exempted not only "processing" but also "marketing * * * storing, or distributing" of certain seafoods.

consistently recognized in other factual situations,[11] that the purpose of the exemption was to permit the use of nonpremium overtime when required by the "seasonal" influx or the "perishability" of the produce—that is, by natural factors beyond the control of the processor. Viewed in the light of that purpose, "first processing" should be interpreted as

---

[11] See *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905, 906-907 (C. A. 9), certiorari denied, 335 U.S. 845, commenting on the very provision involved here:

> The Wage and Hour Division has recognized the clear intendment of the statute in this language:
>
> "The purpose of Section 7(c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive." Wage and Hour Release No. 1892, Jan. 25, 1943.

For other cases recognizing, in differing contexts, the "seasonal" purposes of the various § 7(c) exemptions, see *Walling* v. *Swift & Co.*, 131 F.2d 249, 251 (C.A. 7) ("It was the purpose of Congress, in granting this exemption, to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control."); *Hendricks* v. *DiGiorgio Fruit Corp.*, 49 F.Supp. 573, 575 (N.D. Cal.) ("The legislative history of the Act shows that Congress realized that perishable or seasonal fresh fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control."); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F.Supp. 393, 401-402 (S.D. Cal.); *Shain* v. *Armour & Co.*, 50 F.Supp. 907, 911-912 (W.D. Ky.); cf. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 271.

terminating when the vegetables have been processed to a preservable state and there is a break in the processing operations. The subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption, and the rate at which they are performed is subject to the control of the employer.

4. That interpretation of "first processing" clearly requires that Oregon be denied the exemption for its repackaging operations. When the vegetables have been frozen and stored in bulk at zero temperatures, they are no longer "perishable", in the sense that the word is used in the statute, and the initial processing has been halted. The rate at which the repackaging is done after the season ends is governed not by natural factors but by the employer's convenience and the receipt of orders. That there does not then exist the necessity for overtime that justifies the exemption is convincingly shown by Oregon's drastic reduction of its work force at the end of the active corn season from 300 to 20 employees. When, therefore, upon receipt of orders, Oregon withdraws the previously "processed" vegetables from storage and regrades, reinspects, and repackages them, it should be treated as being engaged in "secondary" processing incidental to its marketing operations and not in the "first processing" necessary to preserve fresh fruits and vegetables from spoilage.

It is no doubt true that, even though largely controllable by storage conditions (R. 144-145), there is always some risk of dehydration if frozen vegetables are stored too long. But that frozen foods

might therefore be described as "perishable" for some purposes does not mean that they are "perishable" in the sense that that term is used in the statute. In the first place, "perishable" as a description of "fresh fruits and vegetables" connotes, primarily at least, deterioration from bacteriological or enzymatic causes rather than from dehydration. More importantly, it implies deterioration of a very different order in terms of urgency than that caused by the long-term dehydration of frozen vegetables. While fresh corn must be processed within a matter of hours, frozen corn at most needs to be removed from storage only within a matter of months.[12] The legislative judgment that would exempt the former operation from the maximum-hours limitation hardly implies also a judgment that would exempt the latter. Rather, the "perishability" of frozen vegetables is clearly not so great as to preclude the regularization of hours by the employment of an adequate work force and does not present the compelling necessity for overtime[13] that Congress has recognized as justi-

---

[12] Oregon's repackaging of its 1954 corn crop continued for over 7 months; of its 1953 crop, for over 9 months (R. 66).

[13] Avoidance of overtime is, in fact, one of the very advantages claimed by advocates of the bulk-packaging procedure. See, *e.g.*, *Bulk Bins Save on Frozen Food Storage*, Western Canner & Packer, v. 49, No. 10, p. 211 (Oct. 1957): "From bulk storage the packer can package as orders and labels are received. Premium labor can be avoided, and packaging can be done by the regular crew after the rush season has passed."

fying an exemption from the premium-pay requirements.[14]

C. THE CONSISTENT ADMINISTRATIVE INTERPRETATION OF THE ACT IS CONTROLLING.

Even were the statute and its legislative history less clear, the question in this case would be foreclosed by the express administrative interpretation of "first processing." The interpretative regulations issued by the Administrator of the Wage and Hour Division now provide (29 C.F.R. (1958 Supp.) 780.51(b)(1)):

> An employer who commences processing operations on a perishable commodity to which the exemption in section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable. * * *

[14] It may be noted additionally that the risk of dehydration is alleviated not by the repackaging as such but only by the final sale and consumption of the vegetables. So long as the vegetables are to be stored, the evidence is that they are less subject to dehydration when stored in bulk than when stored in consumer packages (R. 135). Thus the rate of repackaging is controlled not by perishability but by the receipt of orders. Indeed, the possibility of partial dehydration would, if anything, seem to require that repackaging be postponed until orders are received, so that the dehydrated vegetables can be removed during regrading.

Since Oregon's post-seasonal repackaging operations are neither part of a "continuous series of operations" commencing with the initial processing nor performed while the vegetables "remain perishable," the administrative interpretation of "first processing", if accepted, would clearly preclude their exemption.

The above interpretation was first formally announced, in substantially its present form, in Wage and Hour Release No. 1892, January 25, 1943, and has been outstanding, and consistently applied, ever since.[15] Thus, not only does the regulation represent the considered interpretation of the Act by the agency charged with its enforcement, but it also bears the "unique imprimatur" of Congressional approval given to the then-outstanding rulings by § 16 (c) of the Fair Labor Standards Act Amendments of 1949, 63 Stat. 920. *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 837 (C. A. 5). That section provided in substance that any rulings or interpretations of the Administrator in effect on the date of the 1949 Act "shall remain in effect" if not inconsistent with that Act.[16] Relying on that provision, this Court has consistently given peculiar weight to inter-

---

[15] See also 17 Fed. Reg. 9615 (Oct. 1952), construing "first processing" as limited to "the initial operation which changes the form of the whole fresh fruit or vegetable and all operations on its main portions when performed in a single process as a continuous series of operations throughout which the commodity remains perishable * * *."

[16] See the discussion of the effect of a similar provision of the House bill at *Hearings before House Committee on Education and Labor on H. R. 2033*, 81st Cong., 1st Sess., p. 978.

pretative rulings antedating the 1949 Act. *E.g.*, *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16-17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270; *Steiner* v. *Mitchell*, 350 U. S. 247, 255.[17] The settled administrative interpretation here, dating back at least to 1943 and fully supported both by the purposes of the Act and by the requirement that exemptions from the Fair Labor Standards Act be "narrowly construed",[18] should, therefore, be controlling.

II

The Section 7(c) Exemption Does Not Apply To An Employer Engaged in Mixing and Packaging Vegetables Previously Frozen and Bulk-Packaged By Other Processors.

If Oregon is not exempt under § 7(c) when engaged in repackaging its own previously-frozen vegetables, it necessarily follows that it is not exempt when engaged in mixing and packaging vegetables previously frozen by other processors and purchased

---

[17] Of the numerous proposals made to amend §§ 7(c) and 7(c)(3) in the 1949 Act (see *Hearings, supra*, note 16, at 90-93, 625-634, 776-803, 850-871, 947-978, 1055-1060, 1165-1182, 1245-1248; *Hearings before Subcommittee of Senate Committee on Labor and Public Welfare on S. 58, etc.*, 81st Cong., 1st Sess., pp. 627-792, 1069-1074, 1144-1146), only one minor change, not relevant here, was adopted (see H. Rep. No. 1453, 81st Cong., 1st Sess., p. 19), and one of the arguments made against such amendments was that they would upset the established administrative interpretations of the exemptions (*Hearings, supra*, note 16, at 855).

[18] *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 296.

by Oregon.[19] Even if it should be held that Oregon is exempt when repackaging its own vegetables, however, it would nevertheless not be exempt when mixing and packaging vegetables frozen by others.

Oregon's repackaging operations, since they are by themselves neither the "first" operation nor performed on "fresh" vegetables, could be exempt, if at all, only by being viewed as a continuation of Oregon's initial freezing operations. In the case of the lima beans, string beans, and peas used in the vegetable mix, however, Oregon has not performed any previous operations of which their mixing and packaging could be deemed a "part." Since the mixing and packaging is the *only* operation performed on those vegetables, that operation must necessarily stand on its own feet for purposes of the exemption and as such it clearly is neither the first processing (since other processors have already prepared, frozen, and packed the vegetables) nor performed on fresh vegetables.[20] The processing of such vegetables is undeniably broken—and hence the *first* processing completed—when they have been frozen and packed

---

[19] The vegetable mix packaged and sold by Oregon consists about 60% of corn and carrots previously frozen by it and about 40% of lima beans, string beans, and peas purchased, already frozen and packed in bulk containers, from other processors (R. 19, 65).

[20] "Fresh" vegetables, as interpreted by the Administrator since the adoption of the Act, are those "in their raw and natural state as distinguished from them after they are 'processed', canned or dried." Interpretive Bulletin No. 14, p. 9, 35 W.H.M. 351, 359.

in bulk by the first processor and sold and shipped to Oregon.[21]

Finally, the interpretive regulations under § 7(c) clearly establish that Oregon's mixing and packaging operations cannot be "tacked" to the operations of the original processor so as to be treated as part of a single "processing" which started with the fresh vegetables (29 C.F.R. (1958 Supp.) 780.51(b)(2)):

> Where first processing operations are performed at one place of employment on a commodity named in section 7(c), and further processing operations on the processed commodity are then performed at another place of employment, such further processing operations are not part of the "first processing" of the named commodity which commenced at the first place of employment, but comprise a separate process. * * *

III

Neither the Repackaging Nor the Mixing Operations Are Within the Additional Exemption Provided By Section 7(b)(3).

Section 7(b)(3) of the Act grants a 14-week exemption from the overtime provisions, up to 12 hours a day and 56 hours a week, for industries "found

---

[21] See *Domenico v. Mitchell*, 232 F. 2d 112 (C. A. 10). In that case, the employer, engaged primarily in packing and distributing fresh vegetables purchased from nearby farmers, also purchased "mountain grown" vegetables which had been previously packed by others. Work performed by the employer on the latter vegetables (handling from one car to another, re-icing the cars, and repacking broken crates) was held not to be within the § 7(c) exemption for "first processing".

by the Administrator to be of a seasonal nature."[22] The Administrator has determined that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of § 7(b)(3), also ruling that the exemption thereby granted is cumulative to that given by § 7(c).[23] 5 Fed. Reg. 3167 (set forth at R. 44-49). Since that industry determination is cast in language identical to that of the § 7(c) exemption, the reasons given above for the inapplicability of the § 7(c) exemption to the repackaging and mixing operations are equally applicable here.

In addition, however, the § 7(b)(3) exemption would not be available even if it were held that § 7(c) exemption did include either or both of those operations. To uphold the claimed § 7(c) exemption it would be necessary to reject the consistent administrative interpretation of that section (*supra*, pp. 22-23, 26). But even if not controlling on the meaning of § 7(c), the Administrator's definition of the term "first processing" would seem necessarily to govern the meaning of that term as used in the

---

[22] "Industry" is defined in § 3(h) to include "a trade, business, industry, or branch thereof." By thus defining "industry" in flexible terms, Congress provided the means for limiting exemptions to branches or portions of an industry which are actually seasonal while excluding the non-seasonal "trade" or "business" parts of the industry. See *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 839 (C. A. 5).

[23] The § 7(c) exemption contains no hours limitation. Where both exemptions are applicable, the employer may select the weeks to which to apply each.

Administrator's own industry determination under § 7(b)(3). See, *e.g.*, *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 834-836 (C. A. 5). In construing an administrative ruling, the administrative interpretation is the "ultimate criterion" (*Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414), and a rejection of the Administrator's interpretation of § 7(c) would not require, or permit, a rejection of the clear intent of the Administrator's determination under § 7(b)(3).[24]

[24] That determination must, moreover, be read in the light of § 7(b)(3) which authorizes exemption only upon a finding that the industry is of a "seasonal nature." An interpretation of the determination as exempting Oregon's post-seasonal repackaging and mixing operations would thus be inconsistent with the clear purposes of the statute to limit the relief granted to "seasonal" operations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

HAROLD C. NYSTROM,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

AUGUST 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 515068 89